

IN THE  
**Supreme Court of the United States**

October Term, 1978

No. **78-1070**

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HARRY KOHLBERG,  
*Petitioner,*

v.

JOSEPH LYNN WALKER,  
*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED  
STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI  
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FOR THE FOURTH CIRCUIT

Petitioner, Harry Kohlberg, prays  
that a writ of certiorari issue to  
review the judgment of the United States  
Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States  
Court of Appeals for the Fourth Circuit

is not recorded.

The opinion of the United States District Court for the Eastern District of Virginia, Norfolk Division, is not recorded.

The opinion of the United States Bankruptcy Judge at Norfolk is not recorded.

#### JURISDICTION

The date of the judgment of the United States Court of Appeals for the Fourth Circuit was October 19, 1978. No re-hearing was requested. No order was entered granting an extension of time in which to petition for certiorari. The statutory provision believed to confirm this Court's jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. 1254 (1).

#### QUESTIONS PRESENTED FOR REVIEW

I. Where the Bankruptcy Judge ruled that petitioner was not entitled to relief because of estoppel by asking for and accepting a promissory note for the amount of his claim and cited two authorities which were not relevant, and the United States District Court reversed the Bankruptcy Judge and held that petitioner's judgment was not dischargeable in bankruptcy, did the Court of Appeals err in holding that Bankruptcy Rule 810 required the District Court to accept the referee's findings of fact unless they are clearly erroneous, since the Bankruptcy Judge's holding of estoppel, was a conclusion and inference from facts not in dispute?

II. Did the Bankruptcy Judge err in entering his order of April 19, 1976,



denying petitioner's motion to amend the complaint to include a second count under Clause (4) of Sec. 17 a of the Bankruptcy Act, where the complaint was timely filed, a proposed amendment was proper under Bankruptcy Rule 715 and under the Federal Rules of Civil Procedure, Rule 15 (a), (b), (c), the Bankruptcy Judge sustaining the plea of the Statute of Limitations.

#### STATUTES INVOLVED

The statutes involved are:

1. The Bankruptcy Rule 810, to-wit:

"Upon an appeal, the district court may affirm, modify, or reverse a referee's judgment or order, or remand with instructions for further proceedings. The court shall accept the referee's findings of fact unless they are clearly erroneous, and shall give due regard to the opportunity of the referee to judge of the credibility of the witnesses."

2. 11 U.S.C.A. Sec. 32 (b) (1) to-wit:

"The court shall make an order

"fixing a time for the filing of objections to the bankrupt's discharge and a time for the filing of applications pursuant to section 35 (c) (2) of this title to determine the dischargeability of debts, which time or times shall be not less than thirty days nor more than ninety days after the first date set for the first meeting of creditors. Notice of such order shall be given to all parties in interest as provided in section 94 (b) of this title. The Court may, upon its own motion or, for cause shown, upon motion of any party in interest, extend the time or times for filing such objections or applications."

3. Section 11 U.S.C.A. 35 (a):

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as . . . (2) are liabilities for obtaining money or property by false pretenses or false representations, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused

"to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious conversion of the property of another; . . . (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; . . .

"(c) (2) A creditor who contends that his debt is not discharged under clause (2), (4), or (8) of subdivision (a) of this section must file an application for a determination of dischargeability within the time fixed by the court pursuant to paragraph (1) of subdivision (b) of section 32 of this title and, unless an application is timely filed, the debt shall be discharged. . .

"(3) After hearing upon notice, the court shall determine the dischargeability of any debt for which an application for such determination has been filed, shall make such orders as are necessary to protect or effectuate a determination that any debt is dischargeable and, if any debt is determined to be nondischargeable, shall determine the remaining issues, render judgment, and make all orders necessary for the enforcement thereof . . ."

#### 4. Federal Rule of Civil Procedure

15 (a), (b), (c) to-wit:

"(a) AMENDMENTS. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

"(b) AMENDMENTS TO CONFORM TO THE EVIDENCE. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made

"upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

"(c) RELATION BACK OF AMENDMENTS. Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of

"the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

"The delivery or mailing of process to the United States Attorney, or his designee, or the Attorney General of the United States, or an agency or officer who would have been a proper defendant if named, satisfies the requirement of clauses (1) and (2) hereof with respect to the United States or any agency or officer thereof to be brought into the action as a defendant."

5. Bankruptcy Rule 715 to-wit:

"Rule 15 of the Federal Rules of Civil Procedure applies in adversary proceedings except that (1) a pleading to which no responsive pleading is permitted may be amended as a matter of course at any time within 15 days after it is served but before the date set for trial and that (2) a party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 5 days after service of the amended pleading, whichever period may be longer, unless the



"court otherwise orders."

6. Bankruptcy Rule 806 to-wit:

"Within 10 days after filing the notice of appeal the appellant shall file with the referee and serve on the appellee a designation of the contents for inclusion in the record on appeal and a statement of the issues he intends to present on the appeal. The record shall include the contents so designated and the findings of fact, conclusions of law, and orders entered thereon. If the appellee deems any other papers to be necessary, he shall, within 7 days after the service of the statement of the appellant, file and serve on the appellant a designation of additional papers to be included. If the record designated by any party includes a transcript of any proceeding or a part thereof, he shall immediately after the designation order the transcript and make satisfactory arrangements for payment of its costs. All parties shall take any other action necessary to enable the referee to assemble and transmit the record."

7. Bankruptcy Rule 802 (a) to-wit:

"(a) TEN-DAY PERIOD. The notice of appeal shall be filed with the referee within 10 days

"of the date of the entry of the judgment or order appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires."

STATEMENT OF THE CASE

The Complaint of Kohlberg prays that an order be entered that the obligation of Walker to him is not released or affected by the adjudication of bankruptcy and that a judgment be entered against Walker in the sum of \$148,900.00, stating that the debt was non-dischargeable under clause (2) of Sec. 17 a of the Bankruptcy Act, alleging that Walker obtained from Kohlberg from 1967-1973 the sum of \$148,900.00 as a result of oral representations made to Kohlberg that Walker was solvent and that Walker had funds to repay Kohlberg,

with interest, on demand; that Walker knew during said period of time that he was not solvent and that he did not have funds to pay Kohlberg, with interest, on demand; that Walker intended to induce Kohlberg to advance the money on the basis of the representation; that Walker obtained money from Kohlberg by means of pretenses and false representations; that said false pretenses and representations were made with an intent to induce Kohlberg to advance funds to Walker. Walker's answer to the complaint denied each allegation of the complaint. No pleading was filed by Walker challenging the sufficiency of the complaint.

Thereafter, Kohlberg filed a motion to amend the complaint to include the following count, to-wit:

"Defendant bankrupt created debts by his fraud, embezzlement,

"misappropriation, or defalcation of funds due the plaintiff while the bankrupt was acting as an officer or in a fiduciary capacity." (App. 6)

An order was entered on April 19, 1976 denying leave to amend the complaint on the ground that it was not filed within the deadline set by the Court of March 3, 1976. (App. 7, 8).

The order of discharge entered by the Bankruptcy Judge on June 3, 1976 expressly found as a fact that Walker was guilty of fraud (App. 9-11). The order of discharge, relating to fraud, states:

"This is the case of the unfaithful master and the loyal servant.

"The conduct of Joseph Lynn Walker, the bankrupt here; Joseph L. Walker Corp.; and Walker Realty Co., in their relationship with Harry Kohlberg, the plaintiff, is clearly reprehensible.

"...by his complaint for the determination of the discharge-

"ability of the debt, Kohlberg seeks to have the amount owing him, \$148,900.00, saved from the bankrupt's discharge alleging the bankrupt obtained the funds by false pretenses and false representations.

"The Court finds the Walker organization's modus operandi a deceptive one, a system of taking from Peter to pay Paul, of existing on expectations for a better tomorrow and of tactics to camouflage its inability to meet its obligations to Kohlberg.

"With office account cards lost and thrown out - Kohlberg was able to salvage some - Walker cannot completely explain the organization's financial picture. Further, a most peculiar system of accounting existed. A witness, Lucille S. Miller, Walker's secretary and secretary of the corporation, testified she never knew the difference between the Walker Corporation and the Walker Company. At a sales meeting held on or about April 6, 1967, Walker presented a commissions bonus check in the amount of \$3,430.25 to Kohlberg; however, the check was unsigned - Walker did not have the funds - and it was used ostentatiously before the other salesmen as a carrot on a stick. The best testimony is that the organization was in constant financial difficulty.

"One employee testified the business was in trouble when he came in 1959 and was still in trouble in 1972 when he left. Even the maintenance man left in 1973 after thirteen years service to find more secure employment.

"Indeed, there unfolds the picture of a business somewhat of the strain of the Brown empire where the Court found a course of dealing in expectations sufficient grounds for denial of the bankrupt's entire discharge. In re William Angus Brown, Bankruptcy No. 75-365-N. The rule too simply stated in English is that issuing from In re James, 181 F. 476 (4th Cir. 1910), app. den. 227 U.S. 410: The Walker organization's system of taking another's money, smiling about the good times, yet being unable, knowingly, to meet the obligations to Kohlberg, is out and out the dirty hands doctrine which clearly endangers one's discharge in bankruptcy.

"The renown, classic case on the subject of false pretenses and false representations is Sweet v. Ritter Finance Co., 263 F. Supp. 540 (W.D. Va. 1967). See Hartford Accident & Indemnity Co. v. Flanagan, 28 F. Supp. 415 (D. Ohio 1939), which states, "Public policy forbids the discharge of a bankrupt from debts incurred through fraud

"while acting as an officer  
(of a corporation) or in a  
fiduciary capacity. . ."

The Bankruptcy Judge however ruled  
that Kohlberg was not entitled to relief  
because of estoppel, saying:

"Ah, but woe! As reprehensible  
as was defendant's conduct,  
Kohlberg by the doctrine of  
estoppel is denied the relief  
sued for.

"Kohlberg had positive knowledge  
of the financial difficulties  
certainly as early as 1967;  
nevertheless, he agreed at that  
time to a deferment of his  
commission payments. He rode  
along as a willing sucker.  
(Definition 6, Webster's Third  
New International Dictionary)  
In 1973 he asked for and  
accepted a note in satisfaction  
of his claim. The acceptance of  
a note in satisfaction of money  
previously obtained by a  
bankrupt even if obtained by  
fraud, is not within the meaning  
of the exception to discharge  
contained in Section 17a(2),  
11 U.S.C. 35 (a) (2). By such  
acceptance one is estopped.  
8 Remington On Bankruptcy,  
Section 3325; 1A Collier On  
Bankruptcy, Section 17.16(2)."  
(App. 11, 12)

The statement of issues Kohlberg

intended to present on the appeal to  
the District Court alleged that the  
Bankruptcy Judge erred in holding that  
Kohlberg by the doctrine of estoppel  
was denied the relief sued for, in  
holding that Kohlberg had positive  
knowledge of the bankrupt's financial  
difficulties as early as 1967; that  
Kohlberg was estopped by asking for and  
accepting a note in satisfaction of his  
claim in 1973; that the debt be dis-  
charged in bankruptcy; in denying  
Kohlberg's motion to amend his complaint  
(App. 14, 15).

The memorandum order of District  
Court Judge MacKenzie correctly  
addressed himself to the issue of  
estoppel pointing out:

"Judge Bonney based his holding  
on two fact findings: (1) that  
Kohlberg knew as early as 1967  
that Walker was in financial  
trouble, and (2) that, in 1973,  
Kohlberg asked for and accepted



"a note in satisfaction of his claim. Although these two fact findings are supported by substantial evidence, we do not believe they justify the conclusion that Kohlberg is estopped.

"The better authority holds that the taking of a note, with respect to a liability for fraud, even at a time when the creditor knows of the fraud, is not an estoppel to setting up Section 17 (a) (2) of the Bankruptcy Act in avoidance of a discharge. See authorities collected in 145 ALR 1238. Of like authority is 8 Remington on Bankruptcy § 3325 (6th Edition, 1976 Supplement), Page 187 which states:

"The taking of a note with respect to liability for fraud is not an estoppel to setting up the fraud in avoidance of a plea of discharge in an action on the note.

"1A Collier on Bankruptcy, §17.16 (2) relevant not to the issue of estoppel, but rather to the issue of what constitutes "money or property."

In addition, the District Court Judge correctly held that the evidence was sufficient to show actual fraud, writing:

"Section 17 (a) (2) of the Bankruptcy Act reads, in pertinent part:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except such as . . . (2) are liabilities for obtaining money or property by false pretenses or representations.

"For the debt owed to Kohlberg to have been rendered non-dischargeable under this section, he had to prove actual fraud, or more specifically:

"(1) that money or property was obtained by false pretenses or representations;

"(2) that the bankrupt had thereby engaged in moral turpitude or an intentional wrong;

"(3) that the representations were knowingly and fraudulently made;

"(4) that the representations were reasonably relied upon by Kohlberg.

"1A Collier § 17.16, at 1633 et seq; Sweet v. Ritter Finance Co., 263 F. Supp. 540, 543 (W.D. Va. 1967).

"An examination of the testimony indicates that Kohlberg met



"his burden. Looking beyond the estoppel, which we find inapplicable here, Kohlberg's knowledge of the financial problems of Walker did not, in our judgment, make him aware of the false pretenses and misrepresentations being employed by Walker, misrepresentations and false pretenses which, we find, were relied on by Kohlberg.

"The action of the Bankruptcy Judge in finding that the Walker debt to Kohlberg in the amount of \$143,842.73 was discharged, is REVERSED, and the discharge, as to this debt, is DENIED."

Kohlberg testified that he worked from 1963 to 1973 as a salesman for Joseph L. Walker Realty Corporation (App. 23, 24). From 1963 to 1967, he placed his own funds in special accounts to the bankrupt's corporation, which had agreed to pay interest of 1 percent per month on his funds (App. 25, 26). The source of his funds was retirement checks from the U. S. Navy, savings in banks and savings and loan institutions

(App. 26). The bankrupt's corporation of which he was sole stockholder, was to place Kohlberg's funds in special accounts, to-wit: (1) Special Account Number One was the same as a banking account, as explained by the bankrupt (App. 27); (2) Special Account Number Two was Kohlberg's money on which he had already paid taxes in order to avoid double taxation (App. 27, 28); (3) Special Account Number Three was set up to pay operating expenses of Kohlberg, such as to give away matches to prospective customers (App. 28). He had on hand at the trial cash receipts from the bankrupt's corporation totaling \$67,864.58 from 1963 to 1967 (pl. ex. 1, App. 28). He had cancelled checks of \$21,000.00 to the bankrupt's corporation, starting March 2, 1965 (pl. ex. 2, App. 29, 30). From 1967 to 1970 at the

suggestion of the bankrupt, he accrued bonuses in special accounts or deferred balance of money accounts (App. 31). The bankrupt gave Kohlberg a sheet marked "1967 Operation Taxpayer Bonus," showing how the bonus was calculated (pl. ex. 3, App. 31). There was introduced a non-negotiable check from the bankrupt's corporation dated April 6, 1967, of \$3,400.00, payable to Kohlberg, representing a "1965 Operation Taxpayer Bonus," never signed by the bankrupt (pl. ex. 4, App. 32). He was told after receiving this check to leave it in accounts receivable where it would draw interest, but the bankrupt failed to place it in the accounts receivable account (App. 33). Kohlberg testified that he trusted the company (App. 35). He was never told by the bankrupt that the special account funds had been

transferred on February 12, 1968, from his special account to Walker Realty Corporation Number Two (App. 37). A number of yellow cards were introduced as plaintiff's exhibit 5, from 3/13/63 through 2/12/68, representing monies Kohlberg had invested in the bankrupt's company (pl. ex. 5, pl. ex. 6, App. 33-35, App. 37, 38). A yellow ledger card, marked "Special Account Number Two," representing monies taken out of Kohlberg's checking account of funds on which he had paid taxes and bank certificates was transferred on May 1, 1967, (pl. ex. 7, App. 39), without his knowledge by the bankrupt. He did not receive a photostat of plaintiff's exhibit 6 until 1973 when the bankrupt's son, Jody Walker, made him a photostat (App. 40, pl. ex. 8). In 1967 the bankrupt told him to defer his

commissions to save taxes (App. 41, 42). In 1967 the bankrupt denied that his company was on the verge of bankruptcy, denied that he was in difficulty financially, saying he was backed by attorneys John James, Herbert Kramer, Mr. McGeein, and a financier named Mr. Gutterman (App. 43, 44). The bankrupt in 1967 represented that he owned a group of single residence lots in the Ocean View section of Norfolk, a large commercial lot on East Little Creek Road, giving the impression that the bankrupt owned considerable real estate and he relied on the bankrupt's representation (App. 45). There was introduced as plaintiff's exhibit 9 sheets entitled "Accrued Commissions - Kohlberg, Harry," representing deferred commissions from October 1967 through February 12, 1971 (pl. ex. 9, App. 45,

46). On February 12, 1971, the sum of \$2,076.00 was transferred to his special account with the remainder of \$64,174.84 transferred to accounts receivable, without Kohlberg's knowledge (App. 47). Sheets marked "Kohlberg, Harry - Special Account," from February 9, 1968 through March 25, 1971 were understood to be a savings account at the bankrupt's company and the entire amount of \$40,489.00 was transferred on March 25, 1971, to accounts receivable number 246 (App. 48). On March 25, 1971, the bankrupt refused to permit Kohlberg to draw a thousand dollars per week as he had done in the past (App. 48). He was never told by the bankrupt of any transfer of Kohlberg's funds in the bankrupt's company (App. 49). A one-page sheet marked "Commissions Payable - Kohlberg, Harry" from November of 1966

through March 31, 1970, shows transfers to accrued accounts (pl. ex. 11, App. 49, 50). It was not until the fall of 1973 that the bankrupt's son turned over photostats of these special accounts (App. 50). Kohlberg left the bankrupt in September or October of 1973 (App. 50). Photostats of sheets marked "Commissions Paid - Kohlberg, Harry," represented commissions paid to him from 1966 through 1974 (pl. ex. 12, App. 50, 51). Sheets from March 25, 1966 through April 2, 1974 show accounts receivable owed to him by Walker of \$149,484.20 (pl. ex. 13, App. 51, 52). The bankrupt did not give him credit of \$12,185.13 that was transferred to Walker Realty Corporation card number 2, on the accounts marked Accounts Receivable (pl. ex. 6, App. 38, App. 52, 53). The sum of \$109.32 was transferred

by Walker from Commissions Payable number 531, was not credited to Deferred Account (App. 53). He retired in June 1960 from the Navy after thirty years of service (App. 54). He stopped deferring commissions with the bankrupt in 1970 because of a ruling by the Internal Revenue Service that the deferral of commissions was not lawful (App. 54). After the 1970 ruling of the Internal Revenue Service, Kohlberg demanded payment of his accrued commissions, but bankrupt said he did not have the monies in 1970 (App. 55). Bankrupt said he would give the plaintiff a note for the amount owed (App. 55, 56). Prior thereto, the bankrupt had put him off by saying he was going to close on certain real estate (App. 56). The bankrupt stated that he would commence paying on the



amount owed to Kohlberg in April 1974 (App. 56). The bankrupt guaranteed a note of Joseph L. Walker Corporation, made one payment. Suit was filed in the Circuit Court of the City of Norfolk, which entered judgment in 1974 (App. 57). Kohlberg trusted the bankrupt and his comptroller Bob Mullins (App. 58). The plaintiff was naive, a bum businessman (App. 58).

On cross-examination, Kohlberg testified that he did not question the financial condition of the bankrupt because of the many closings that were pending (App. 61). He did not believe that there was any risk attached to placing his funds at 1 percent interest per month, did not know the company was in difficulty, relied upon the bankrupt's representation of his many backers, that he was doing a great business, and that

he owned considerable real estate (App. 63). The note guaranteed by the bankrupt was dated September 5, 1973 (App. 65). Kohlberg did not think that the bankrupt was in financial difficulty from 1966 to 1967 (App. 67). He first became aware that the cash flow of the company had deteriorated in 1970 (App. 68). He first became aware of financial difficulty of the bankrupt in 1970 after the Internal Revenue Service straightened out his returns (App. 75). Thereafter, he did not defer any commissions.

Joseph L. Walker, the bankrupt, called as an adverse witness, testified that he was the sole stockholder of Joseph L. Walker Realty Corporation (App. 85). He held a broker's license (App. 85). His corporation owned no real estate from 1963 to 1973 (App. 86).



His corporation was the sole stockholder of the Norwalk Corporation, the Walker Realty Trailer Company, and the Richo Corporation (App. 87, 88). His corporation owned stock in the Morse Realty Corporation (App. 88). His corporation was equal partner with Wellington Woods, Inc. in a partnership known as Walker Realty Company, which was organized in 1966 and continued existence to early 1975 (App. 89, 90). He transferred Kohlberg's money into Walker Realty Company (App. 90). He kept no separate bank accounts for Walker Realty Company and the Walker Corporation (App. 92). He personally never notified Kohlberg of any transfer of Kohlberg's funds (App. 93).

The witnesses offered by the bankrupt, to-wit: Lucille S. Miller, Clyde Thornton, Christopher Council, and

James P. McGeein, Bob Mullins, and the bankrupt himself did not say that the plaintiff knew of any financial difficulties experienced by the bankrupt from 1963 through 1970. For example, Lucille S. Miller, the bankrupt's girlfriend, first went to work on August 7, 1972 (App. 98). Clyde Thornton first learned that the bankrupt was in financial difficulty in the early part of 1973 (App. 107). Christopher Council, a son-in-law of the bankrupt, stated that the bankrupt was in bad financial condition in early 1973 (App. 113). Mr. McGeein said that Kohlberg was aware of bankrupt's problems in September 1973 (App. 121). Bob Mullins, comptroller for the bankrupt from November 1959 through May 1972 (App. 127, 128), while stating that the bankrupt was in financial difficulty

continuously from 1959 to 1972, stated that he did not disclose to plaintiff the financial condition of the bankrupt because he did not feel that it was his duty to do so. (App. 138, 139, 147, 148, 150).

Kohlberg on rebuttal denied that he was told by either bankrupt or Mullins that the bankrupt was in bad shape financially (App. 174, 175). The bankrupt told him that everything was fine and not to believe rumors (App. 175). He was told by the bankrupt that there was no need for him to get statements of his funds because the company would not cheat him, the auditors checked the books every three months and would catch anything wrong (App. 175, 176). Kohlberg trusted the bankrupt (App. 176).

The opinion of the Court of Appeals for the Fourth Circuit reversed the

District Court on the ground that the Fourth Circuit believed that the Bankruptcy Court found that petitioner did not reasonably rely on the statements made by Walker, declining to consider the issue of whether the taking of the note in satisfaction of the debt should estop Kohlberg from preventing the discharge of the obligation. The last sentence of the opinion states that because the District Court did not test the Bankruptcy Court's findings under the proper standard but, instead, merely substituted its factual conclusions in their place, this judgment must be reversed.

#### REASONS FOR GRANTING THE WRIT

I. The Court of Appeals adopted an improper standard by reading into the Bankruptcy Judge's order of discharge words which the order does not express.

The Bankruptcy Judge did not find as a fact that petitioner did not reasonably rely on the statements made by Walker. The Fourth Circuit should have adopted the rule that the District Court is not bound by the conclusions and inferences which the Bankruptcy Judge draws therefrom. Its order of reversal of the District Court conflicts with cases from other circuits. It misconstrued the Bankruptcy Rule 810 as to the clearly erroneous rule set forth therein, identical to Bankruptcy Rule 752 (a). The following circuits, construing Bankruptcy Rules 810 and 752 (a) hold that when the facts are not in dispute, the reviewing court is not bound by the conclusions and inferences which the referee draws therefrom, that the District Court can freely draw differing inferences from undisputed facts, and

where the factual determination is primarily a matter of drawing inferences from undisputed facts, the clearly erroneous rule does not apply to questions of law or to mixed questions of fact and law, nor where the referee's error is one of law consisting of giving wrong legal significance to facts, nor to a finding dealing with the effect of certain transactions or events nor to a determination of legal consequences or undisputed acts: In re Morasco, 233 F. 2d 11 (C.A. 2d 1956); Shaw v. U. S. Rubber Co., 361 F. 2d 679 (C.A. 5th 1966); Stafos v. Jarvis, 477 F. 2d 369 (C.A. 10th 1973); Solomon v. Northwestern State Bank, 327 F. 2d 720 (C.A. 8th 1964); Minnick v. Lafayette Loan & Trust Co., 392 F. 2d 973 (C.A. 7th 1968); Costello v. Fazio, 256 F. 2d 903 (C.A. 9th 1958); Namoff v. Hyland

Elec. Supply Co., 275 F. 2d 14, certiorari denied 364 U.S. 818, 5 L. Ed. 2d 49 (C.A. 7th 1960).

A reading of the Bankruptcy Judges' order of discharge discloses that the order is grounded on the taking of a note guaranteed by Walker. The two authorities cited in the order of discharge do not apply.

In 1A Collier on Bankruptcy, Sec. 17.16 (6), p. 1650.1, it is said:

"In the Bankruptcy Court, the issue is whether the debt is discharged or rendered nondischargeable by Sec. 17 a (2), an issue not presented in the prior state court action and not capable of being raised. The issues in the two actions are different. As to the facts raised in the state court action, the particular ones pertaining to Sec. 17 a (2) of the Bankruptcy Act were not necessary to the judgment obtained, and not even relevant thereto. They become relevant only on the issue of dischargeability of the debt in bankruptcy and have no bearing on whether or not one is indebted

"to another. In such a case the authorities are in accord that the doctrine of collateral estoppel does not apply to bar the Bankruptcy Court from contesting those facts in the subsequent trial in the Bankruptcy Court."

In Sweet v. Ritter Finance Co., 263 F. Supp. 540 (W.D. Va. 1967), it was held that a creditor who claimed that its debt was not discharged by the debtor's discharge in bankruptcy, did not affect the dischargeability of debt by reducing it to judgment in a state court.

In accord are the following authorities:

National Homes Corp. v. Lester Industries, Inc., 336 F. Supp. 644 (D.C. Va. 1972);

Hisey v. Lewis-Gale Hospital, 27 F. Supp. 20 (W.D. Va. 1939);

Arnold v. Employers' Insurance of Wausau, 465 F. 2d 354 (10th Cir. 1972);

Fidelity & Casualty Co. of New York v. Golombosky, 133 Conn. 317, 50 A. 2d 817;



Levin v. Singer, 227 Md. 45,  
175 A. 2d 423 (1961);

American Surety Co. v. McKiernan,  
304 Mich. 322, 8 NW 2d 82  
(1943);

Gregory v. Williams, 106 Kan.  
819, 189 P. 932 (1920);

Guernsey-Newton Co. v. Napier,  
151 Wash. 318, 275 P. 724 (1929);

United States Credit Bureau v.  
Manning, 147 C.A. 2d 558, 305  
P. 2d 970 (1957);

Gehlen v. Patterson, 83 N.H. 328,  
141 A. 914 (1928);

8 Remington on Bankruptcy, Sec.  
3325, 3871;

9 Am. Jur. 2d Bankruptcy, Sec.  
821, p. 616;

Fierman v. Lazarus, 361 F. Supp.  
477 (E.D. Pa. 1973) aff'd 493  
F. 2d 1400 (3d Cir. 1973);

Matter of Pigge, 539 F. 2d 369  
(C.A. 4th 1976).

Walker concealed from Kohlberg his financial difficulties of which Kohlberg first learned in 1970 when Internal Revenue Service ruled that he could not defer his commissions, at

which time he stopped deferring same.

The evidence recited in this petition clearly shows that Kohlberg did not know of the financial difficulties of the bankrupt until 1970, at which time he promptly stopped deferring his commissions. In 1967 when he first deferred his commissions, he was told by the bankrupt that the bonus check payable to him, not signed by the bankrupt, was to be placed in a special account drawing interest. This was not done by the bankrupt and was never disclosed to Kohlberg.

II. The denial by the Bankruptcy Court in entering its order of April 19, 1976 of the petitioner's motion to amend the complaint under Section 17 (a) (4) of the Bankruptcy Act that Walker created debts by his fraud, embezzlement, misappropriation, or defalcation



of funds due petitioner while the bankrupt was acting as officer in a fiduciary capacity conflicts with Bankruptcy Rule 715, Federal Rule of Civil Procedure 15 (a), (b), (c). The sole basis of the order denying the proposed amendment was that it should have been filed prior to March 3, 1976, which was the last day for filing complaints to determine the dischargeability of debts.

Bankruptcy Rule 715 states that Rule 15 of the Federal Rules of Civil Procedure applies in adversary proceedings. Rule 15 (a) states that leave to amend pleadings shall be freely given when justice so requires. Rule 15 (b) permits amendment of pleadings at the trial on the ground that evidence is not within the issues made by the pleadings and that amendment shall be

made freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the omission of such evidence would prejudice him in maintaining his defense upon the merits, with permission given by the court to grant a continuance to enable the objecting party to meet such evidence. Rule 15 (c) states that when the claim asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.

In 6 Wright and Miller, Federal Practice and Procedure, Sec. 1472, p. 361, it is said that Bankruptcy courts usually have been very liberal when

allowing amendments to pleadings.

In the case of Charles Edward & Associates v. England, 301 F. 2d 572 (9th Cir. 1962), the court held that amendment of bankruptcy specifications should have been granted in accordance with liberal spirit of the applicable Federal Rules of Civil Procedure.

In the case of In re Sturdevant, 415 F. 2d 465 (5th Cir. 1969), a bank was allowed to file amended specifications of objections to discharge but within the time allowed by the referee's order.

The complaint was timely filed within the date fixed by the Bankruptcy Judge's order. The amendment was another allegation of fraud by the bankrupt. Under federal law, the fraud of Joseph L. Walker Realty Corporation, where the bankrupt is sole stockholder,

is chargeable to him. The bankrupt was a fiduciary. Hamby v. St. Paul Mercury Idem. Co., 217 F. 2d 78 (C.A. 4); Bloemecke v. Applegate, 271 F. 595 (C.A. N.J. 1920); In re Kunkle, 40 F. 2d 563 (D.C. Mich. 1930); Kadish v. PHX-Scotts Sports Co., 11 Ariz. App. 575, 466 P. 2d 794; 8 Remington on Bankruptcy, Sec. 3362, Sec. 3363, Sec. 3368, Sec. 3871.

#### CONCLUSION

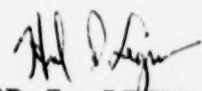
1. The Bankruptcy Judge found Walker to be guilty of fraud towards petitioner. Kohlberg left with Walker his savings as well as commissions he had earned. The estoppel concluded by the Bankruptcy Judge is not supported by the evidence and does not represent a factual finding within the clearly erroneous rule.

2. The Bankruptcy Judge heard and

denied the motion to amend the complaint to include a count under Clause (4), Section 17 of the Bankruptcy Act. The evidence supported such a clause and under 15 (c) of the Federal Rules of Civil Procedure, it would relate back to the timely filing of the complaint under Clause (2) of the Federal Rules of Civil Procedure. On review to the District Court from the Bankruptcy Court, petitioner listed as an issue on appeal the denial of the motion to amend, as well as in his brief to the Fourth Circuit. The opinion of the Fourth Circuit, as well as the opinion of the District Judge, do not discuss this issue.

3. The petition for certiorari should be granted.

Respectfully submitted,

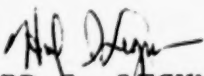
  
HOWARD I. LEGUM  
Counsel for Harry Kohlberg

Fine, Fine, Legum & Fine  
720 Law Building  
Norfolk, Virginia 23510

Counsel for Petitioner

CERTIFICATE OF SERVICE

Pursuant to Rule 33, paragraph 3(b),  
I certify that service was made on  
respondent Joseph Lynn Walker, by  
depositing three printed copies of the  
Petition for Certiorari in a United  
States mail box, with first class  
postage prepaid, addressed Archie L.  
Boswell, Virginia National Bank Bldg.,  
P.O. Box 3312, Norfolk, Virginia, 23514,  
this 3<sup>rd</sup> day of January, 1979.

  
HOWARD I. LEGUM  
Attorney for Petitioner, a  
member of the bar for the  
Supreme Court of the  
United States

JUDGMENT  
UNITED STATES COURT OF APPEALS  
for the  
Fourth Circuit

No. 77-1308

In re:

Joseph Lynn Walker      Bankrupt,  
Harry Kohlberg,      Appellee,  
v.

Joseph Lynn Walker,      Appellant.  
Appeal from the United States District  
Court for the Eastern District of  
Virginia.

This cause came on to be heard on the  
record from the United States District  
Court for the Eastern District of  
Virginia, and was argued by counsel.

On consideration whereof, It is now  
here ordered and adjudged by this Court  
that the judgment of the said District  
Court appealed from, in this cause, be,  
and the same is hereby, reversed.

William K. Slate, II  
Clerk

Filed  
Oct 19 1978  
William K. Slate, II  
Clerk

PER CURIAM:

This is an appeal from a decision of the district court reversing a decision of the bankruptcy court in which that court granted the bankrupt Walker discharge of a debt owed Kohlberg. Because we believe the district court did not adhere to the proper standard of review of bankruptcy court findings of fact, that the findings will not be disturbed unless clearly erroneous, we reverse.

The case arises from the dealings involving Walker Realty Company and Harry Kohlberg, its salesman. Kohlberg was induced to invest money in Walker Realty at one percent a month interest and to defer commissions and bonuses. This sum of monies, accumulated between 1967 and 1973, are the source of contention. In 1973, Walker endorsed a

note in the amount of \$150,000 to Kohlberg from Walker Realty in satisfaction of the debt.

After Walker filed his petition in bankruptcy on February 20, 1976, Kohlberg objected under § 17 (a) (2) of the bankruptcy act, 11 U.S.C. §35 (a) (2), to the dischargeability of the debt, claiming that ". . . Walker, bankrupt, obtained from . . . Kohlberg the sum of \$148,900 from 1967-1973 as a result of oral representations made to . . . [Kohlberg] that . . . [Walker] was solvent and that . . . [Walker] had funds to repay . . . [Kohlberg], with interest, on demand;" that Walker "knew during said period of time that he was not solvent and that he did not have funds to pay . . . [Kohlberg], with interest, on demand;" that Walker "intended to induce Kohlberg to advance



the money on the basis of the representation;" that Walker "obtained money from . . . [Kohlberg] by means of pretenses and false representations; that "said false pretenses and representations were made with an intent to induce . . . [Kohlberg] to advance funds to Walker." The bankruptcy court, after expressing criticism of Walker's practices, found that Kohlberg was estopped from preventing discharge of the debt, because (1) having "positive knowledge of the bankrupt's financial difficulties as early as 1967," he "rode along as a willing sucker;" and (2) the taking of a note in satisfaction of the debt estopped recovery.

The district court, in reversing the decision of the bankruptcy judge, held that the acceptance of a note in satisfaction of a debt does not operate

as an estoppel to setting up the fraud which induced the original debt in an attempt to avoid discharge of that debt and that Kohlberg's knowledge of the bankrupt's financial conditions did not prevent his reliance on the bankrupt's representations.

Because we believe that the bankruptcy court found that Kohlberg did not reasonably rely on the statements made by Walker, we do not have to consider the issue of whether the taking of the note in satisfaction of the debt should estop Kohlberg from preventing the discharge of the obligation.

When a bankruptcy judge makes a finding of fact, that determination stands, on appeal to the district court, on much the same footing as a finding of fact by a district court on appeal from that court to a court of appeals.

The finding will not be disturbed unless "clearly erroneous." Bankruptcy Rule 752. Rule 752 is an adaptation of FRCP 52 and we think should be construed the same as FRCP 52. See Advisory Committee's note to Rule 752 found at p. 120 of U.S.C.A.

Here, the bankruptcy court found that "Kohlberg had positive knowledge of the financial difficulties certainly as early as 1967; nevertheless, he agreed at that time to a deferment of his commission payments. He rode along as a willing sucker." Yet the district court decided that "Kohlberg's knowledge of the financial problems of Walker did not . . . make him aware of the false pretenses and misrepresentations being employed by Walker, misrepresentations and false pretenses which . . . were relied on by Kohlberg."

We feel that this part of the district court's decision failed to give proper deference to the requirements of Bankruptcy Rule 752. The bankruptcy court's factual determination that Kohlberg was a willing sucker who had "positive knowledge of the financial difficulties" conflicts, we believe, with the district court's finding that Kohlberg reasonably relied on Walker's representations.

In order to prove that his debt is non-dischargeable under § 17 (a) (2), Kohlberg must prove that he reasonably relied on the representations made by Walker. Sweet v. Ritter Finance Co., 263 F. Supp. 540 (W.D. Va. 1967). Although it might be said that an innocent sucker might reasonably rely on statements, we do not believe that

a "willing sucker" who "rode along" while having "positive knowledge" of the debtor's financial difficulties can be said to have exercised reasonable reliance.

We are therefore of opinion the district court's factual finding of reliance conflicts with the factual determinations made by the bankruptcy court. Because the district court did not test the bankruptcy court's findings under the proper standard but, instead, merely substituted its factual conclusions in their place, its judgment must be reversed.

REVERSED.

IN THE UNITED STATES  
DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA

Norfolk Division

In re

JOSEPH LYNN WALKER,  
Bankrupt

HARRY KOHLBERG,

Appellant

v. Bankruptcy No. 75-1555-N

JOSEPH LYNN WALKER,

Appellee

MEMORANDUM ORDER

This is an appeal from an order of the Bankruptcy Judge that the debt of the bankrupt Walker to the appellant Kohlberg be discharged.

In his complaint Kohlberg had sought to have the amount owed to him (he alleges \$143,842.73) saved from the bankrupt's discharge on the ground that

the funds were obtained by false pretenses and representations.

The Bankruptcy Judge found that the bankrupt's conduct toward his sales agent Kohlberg was indeed reprehensible, but that Kohlberg was estopped from raising the exception to discharge contained in the Bankruptcy Act § 17 (a) (2), 11 U.S.C.A. 35 (a) (2).

Judge Bonney based his holding on two fact findings: (1) that Kohlberg knew as early as 1967 that Walker was in financial trouble, and (2) that, in 1973, Kohlberg asked for and accepted a note in satisfaction of his claim. Although these two fact findings are supported by substantial evidence, we do not believe they justify the conclusion that Kohlberg is estopped.

The better authority holds that the taking of a note, with respect to a

liability for fraud, even at a time when the creditor knows of the fraud, is not an estoppel to setting up Section 17 (a) (2) of the Bankruptcy Act in avoidance of a discharge. See authorities collected in 145 ALR 1238. Of like authority is 8 Remington on Bankruptcy § 3325 (6th Edition, 1976 Supplement), Page 187 which states:

"The taking of a note with respect to liability for fraud is not an estoppel to setting up the fraud in avoidance of a plea of discharge in an action on the note."

1A Collier on Bankruptcy, § 17.16[2] is relevant not to the issue of estoppel, but rather to the issue of what constitutes "money or property."

Section 17 (a) (2) of the Bankruptcy Act reads, in pertinent part:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except such as . . . (2) are liabilities for obtaining



"money or property by false pretenses or representations."

For the debt owed to Kohlberg to have been rendered non-dischargeable under this section, he had to prove actual fraud, or more specifically:

(1) that money or property was obtained by false pretenses or representations;

(2) that the bankrupt had thereby engaged in moral turpitude or an intentional wrong;

(3) that the representations were knowingly and fraudulently made;

(4) that the representations were reasonably relied upon by Kohlberg.

1A Collier, § 17.16, at 1633 et seq; Sweet v. Ritter Finance Co., 263 F. Supp. 540, 543 (W.D. Va. 1967).

An examination of the testimony indicates that Kohlberg met his burden. Looking beyond the estoppel, which we

find inapplicable here, Kohlberg's knowledge of the financial problems of Walker did not, in our judgment, make him aware of the false pretenses and misrepresentations being employed by Walker, misrepresentations and false pretenses which, we find, were relied on by Kohlberg.

The action of the Bankruptcy Judge in finding that the Walker debt to Kohlberg in the amount of \$143,842.73 was discharged, is REVERSED, and the discharge, as to this debt, is DENIED.

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U. S. District Judge

Norfolk, Virginia

December 22, 1976

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF VIRGINIA

In re

JOSEPH LYNN WALKER,

Bankrupt

HARRY KOHLBERG,

Plaintiff

v. Bankruptcy No. 75-1555-N

JOSEPH LYNN WALKER,

Defendant

ORDER OF DISCHARGE

This is the case of the unfaithful master and the loyal servant.

The conduct of Joseph Lynn Walker, the bankrupt here; Joseph L. Walker Realty Corp.; and Walker Realty Co., in their relationship with Harry Kohlberg, the plaintiff, is clearly reprehensible.

The value of Kohlberg to the Walker organization from 1963 - 1973 is

indisputable as he for several years averaged \$2,500,000 in realty sales, reaching a peak year of \$3,870,000. Obviously, Kohlberg's commissions on such a volume were huge, averaging \$75,000 annually and on an occasion exceeding \$100,000. He was a salesman devoutly to be wished.

When Walker offered to pay interest at the rate of 1% per month on funds Kohlberg would place in a "savings account" with the firm, Kohlberg in 1963 began what he at times referred to in his testimony as to "invest," first channeling proceeds from the sale of a family residence into the account. He continued this until 1967. From this account Kohlberg had no difficulty withdrawing funds for such purposes as purchasing a new automobile until 1967 when doing so became a problem and even

impossible. Further, Walker suggested that Kohlberg defer receiving his commission payments until some future but indefinite time. This was agreed to and effected.

Thereafter, and from time to time, Kohlberg made demand for his deferred commissions but was unable to obtain any. Finally, Kohlberg suggested a note to cover the amount due him and by instrument dated September 5, 1973, this was accomplished on paper in the amount of \$150,000, made by Joseph L. Walker Realty Corporation, by its President, Joseph L. Walker, and personally endorsed by Joseph L. Walker. [a part of defendant's exhibit #1] But a single payment was made on the note.

By his complaint for the determination of the dischargeability of the debt, Kohlberg seeks to have the

amount owing him, \$148,900.00, saved from the bankrupt's discharge alleging the bankrupt obtained the funds by false pretenses and false representations.

The Court finds the Walker organization's modus operandi a deceptive one, a system of taking from Peter to pay Paul, of existing on expectations for a better tomorrow and of tactics to camouflage its inability to meet its obligations to Kohlberg.

With office account cards lost and thrown out - Kohlberg was able to salvage some - Walker cannot completely explain the organization's financial picture. Further, a most peculiar system of accounting existed. A witness, Lucille S. Miller, Walker's secretary and secretary of the corporation, testified she never knew the difference between the Walker

Corporation and the Walker Company. At a sales meeting held on or about April 6, 1967, Walker presented a commissions bonus check in the amount of \$3,430.25 to Kohlberg; however, the check was unsigned - Walker did not have the funds - and it was used ostentatiously before the other salesmen as a carrot on a stick. The best testimony is that the organization was in constant financial difficulty. One employee testified the business was in trouble when he came in 1959 and was still in trouble in 1972 when he left. Even the maintenance man left in 1973 after thirteen years service to find more secure employment.

Indeed, there unfolds the picture of a business somewhat of the strain of the Brown empire where the Court found a course of dealing in expectations

sufficient grounds for denial of the bankrupt's entire discharge. In re William Angus Brown, Bankruptcy No. 75-365-N. The rule too simply stated in English is that issuing from In re James, 181 F. 476 (4th Cir. 1910), app. den. 227 U.S. 410:

"A bankrupt, in order to be entitled to a discharge, must come into court with clean hands, and show that his conduct has been that of an honest, upright man."

The Walker organization's system of taking another's money, smiling about the good times, yet being unable, knowingly, to meet the obligations to Kohlberg, is out and out the dirty hands doctrine which clearly endangers one's discharge in bankruptcy.

The renown, classic case on the subject of false pretenses and false representations is Sweet v. Ritter Finance Co., 263 F. Supp. 540 (W.D. Va.



1967). See Hartford Accident & Indemnity Co. v. Flanagan, 28 F. Supp. 415 (D. Ohio 1939), which states, "Public policy forbids the discharge of a bankrupt from debts incurred through fraud while acting as an officer [of a corporation] or in a fiduciary capacity . . . ."

Ah, but woe! As reprehensible as was defendant's conduct, Kohlberg by the doctrine of estoppel is denied the relief sued for.

Kohlberg had positive knowledge of the financial difficulties certainly as early as 1967; nevertheless, he agreed at that time to a deferment of his commission payments. He rode along as a willing sucker. [Definition 6, Webster's Third New International Dictionary] In 1973 he asked for and accepted a note in satisfaction of his

claim. The acceptance of a note in satisfaction of money previously obtained by a bankrupt even if obtained by fraud, is not within the meaning of the exception to discharge contained in Section 17 a (2), 11 U.S.C. 35 (a) (2). By such acceptance one is estopped. 8 Remington on Bankruptcy, Section 3325; 1A Collier on Bankruptcy, Section 17.16 [2].

It appearing to the Court, according to the evidence and the law, that the specifications set forth in said complaint have not been sustained, it is, therefore,

ORDERED that said debt be, and it hereby is, discharged in bankruptcy in accordance with the provisions of Section 17 of the Bankruptcy Act, 11 U.S.C. 35.

It is furthermore ORDERED that the plaintiff whose debt is discharged by

this order is enjoined from instituting  
or continuing any action or employing  
any process to collect such debt as a  
personal liability of the bankrupt.

The clerk will forward a copy of this  
order to the attorney for the plaintiff,  
the attorney for the defendant, and the  
trustee.

HAL J. BONNEY, JR.  
U. S. Bankruptcy Judge

Norfolk, Virginia

June 3, 1976

IN THE UNITED STATES  
DISTRICT COURT FOR THE  
EASTERN DISTRICT OF VIRGINIA

Norfolk Division

In re

JOSEPH LYNN WALKER,  
Bankrupt

Bankruptcy No. 75-1555-N

HARRY KOHLBERG,

Plaintiff

v.

JOSEPH LYNN WALKER,

Defendant

ORDER DENYING LEAVE TO AMEND COMPLAINT

Upon the motion of the plaintiff,  
Harry Kohlberg, for leave to file an  
amendment to his Complaint pending  
herein, this cause came on to be heard  
on the 13th day of April, 1976, the  
plaintiff, Harry Kohlberg, being  
represented by his attorney, Howard I.

Legum, and the defendant bankrupt,  
Joseph Lynn Walker, being represented  
by his attorney, Archie L. Boswell;

It appearing to the Court that an  
Order was entered by this Court on the  
15th day of December, 1975 fixing  
March 3, 1976 as the last day for filing  
complaints as provided in § 17 c (2)  
of the Bankruptcy Act to determine the  
dischargeability of debts claimed to be  
nondischargeable under clauses (2), (4),  
or (8) of § 17 a (2) of the Bankruptcy  
Act, and the said Harry Kohlberg  
further, on April 5, 1976, filed a  
Motion for leave to amend his complaint  
to include an objection to discharge-  
ability under § 17 c (4) of the  
Bankruptcy Act;

It further appearing to the Court  
that the filing of such an amendment is  
governed by the provisions of § 17 c of

the Bankruptcy Act, and Rule 409 of the  
Rules of Bankruptcy Procedure, that the  
limitations specified by the Court by  
the Order of December 15, 1975 pursuant  
to the said Section, and the said Rule,  
are much like the limitation of a  
statute of limitations, and that after  
the passing of the last day for so  
filing such complaints the plaintiff  
may not bring in a new ground of  
objection to dischargeability by  
amendment, and the Court is accordingly  
of opinion that the request for leave  
to amend is not timely filed; it is  
accordingly

ORDERED, that the Motion of the  
plaintiff, Harry Kohlberg, filed on  
April 5, 1976, for leave to amend his  
complaint, be, and it hereby is,  
over-ruled, denied, and disallowed, to  
all of which the said plaintiff,

Harry Kohlberg, by counsel, objects and  
excepts.

Entered at Norfolk, Virginia, this  
the 19th day of April, 1976.

U.S. Bankruptcy Judge

I ASK FOR THIS:

Attorney for Joseph  
Lynn Walker

SEEN, OBJECTED and EXCEPTED TO:

Attorney for Harry Kohlberg